

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 6 (Sub-No. 495X)

BNSF RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN FLATHEAD
COUNTY, MONTANA

Digest:¹ This decision allows BNSF Railway Company to end its common carrier obligation to provide freight rail service over a 2.7-mile rail line in Flathead County, Mont., subject to conditions.

Decided: August 14, 2017

By petition filed on April 26, 2017, BNSF Railway Company (BNSF) seeks an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 to abandon a 2.7-mile rail line extending from milepost 1225.19 to the south end of the line at milepost 1227.58 and to the west end of the line at Engineering Station 189+36 (milepost 1227.10), in Kalispell, Flathead County, Mont. (the Line). Notice of the exemption was served and published in the Federal Register on May 16, 2017 (82 Fed. Reg. 22,603).

On May 23, 2017, the City of Kalispell (the City) requested issuance of a notice of interim trail use (NITU) for the Line. BNSF responded that it does not oppose the issuance of a NITU.

As discussed below, the Board will grant the exemption from 49 U.S.C. § 10903, subject to historic preservation, trail use, public use, and standard employee protective conditions. In addition, BNSF may not consummate the abandonment until the shippers on the line have been relocated and the other railroad providing service has discontinued service over the Line.

BACKGROUND

In 2005, Mission Mountain Railroad (MMT) received Board authority to serve customers over the Line. Mission Mountain R.R.—Acquis. Exemption—Burlington N. & Santa Fe Ry., FD 34634 (STB served Jan. 19, 2005). According to BNSF, MMT has since been providing local service to the only two customers on the Line, Northwest Drywall & Building Supply (Northwest Drywall) and CHS Inc. (CHS). (BNSF Pet. 3.) BNSF states that Northwest Drywall and CHS are relocating to Glacier Rail Park and do not oppose the abandonment. (Id. at 3 &

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Ex. B.) MMT has filed for an exemption from the statutory requirements to discontinue rail service over the Line.² Mission Mountain R.R.—Discontinuance of Serv. Exemption—in Flathead Cty., Mont., AB 1009 (Sub-No. 1X) (STB served June 23, 2017).

According to BNSF, there has been no overhead traffic on the Line and the Line does not contain federally granted rights-of-way. (BNSF Pet. 2-3.)

According to CHS, the City and the Flathead County Economic Development Authority have agreed to fund CHS's move to Glacier Rail Park. (BNSF Pet., Ex. B, CHS Letter at 1.) On August 10, 2017, CHS filed a request asking that the Board defer ruling on BNSF's petition until the funding agreements are finalized, which CHS anticipates will take 30 to 60 days. (CHS Pet., Aug. 10, 2017.) BNSF responded on August 11, 2017, stating that it does not intend to consummate the abandonment before CHS and Northwest Drywall are relocated and consenting to the imposition of a condition to that effect. (BNSF Reply, Aug. 11, 2017.)

DISCUSSION AND CONCLUSIONS

Exemption from 49 U.S.C. § 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Here, detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP. By minimizing the administrative expense of the application process, an exemption would expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. § 10101(2), (7). Granting BNSF's petition would therefore foster sound economic conditions and would encourage efficient management. 49 U.S.C. § 10101(5), (9). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

The Board also finds that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power.³ As discussed above, the two shippers on the Line, Northwest Drywall and CHS, plan to relocate to a rail park, although CHS has asked that the Board delay granting the abandonment until it has finalized its funding arrangements for its

² BNSF may not consummate the abandonment or conduct any salvage activities until MMT has confirmed to BNSF that MMT has received and exercised authority to discontinue service over the Line.

³ Because the Board finds that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the proposed abandonment is limited in scope.

move. Given BNSF's agreement that it will not consummate the abandonment until the two shippers have been relocated, the Board finds that granting the petition subject to such a condition is sufficient to protect the shippers from the abuse of market power. See Union Pac. R.R.—Aban. Exemption & Discontinuance of Serv.—in Tarrant Cty., Tex., AB 33 (Sub-No. 280X) et al., slip op. at 3 (STB served Nov. 25, 2009). The Board will direct BNSF to serve copies of this decision on Northwest Drywall and CHS so that they receive it within five days of the service date, and to certify to the Board contemporaneously that it has done so.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose on BNSF the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental and Historic Review. BNSF has submitted a combined environmental and historic report with its petition and has notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7, 1105.8, & 1105.11. The Board's Office of Environmental Analysis (OEA) has reviewed the report, investigated the environmental record, and analyzed the probable effects of the proposed action on the quality of the human environment.

In an Environmental Assessment (EA) issued on June 23, 2017, OEA concluded that, as proposed, the abandonment of the Line would not significantly affect the quality of the human environment. Comments on the EA were due by July 24, 2017, and no comments were filed. In the Final EA, issued July 27, 2017, OEA recommended one condition pursuant to Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108.

OEA provided a copy of the EA to the Montana Historical Society (the State Historic Preservation Office, or SHPO) for comment. The SHPO indicates that a report by the Federal Railroad Administration (FRA) under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, exists for the section of the Line from milepost 1225.19 to milepost 1226.79.⁴ The SHPO considers Section 106 consultation with the FRA for that portion of the Line to be complete, and FRA has submitted an executed Memorandum of Agreement⁵ to mitigate the adverse historic effects of the abandonment on that portion.

⁴ FRA undertook the Section 106 review because the City will be receiving federal funds administered by FRA for this portion of track.

⁵ The Director of OEA is a signatory to the Memorandum of Agreement, which can be found on the Board's website at www.stb.gov. To access the memo, choose drop-down menu "Environmental Matters," then "Environmental Correspondence," then "AB_6_495X," and then (continued . . .)

However, the sections of the Line from milepost 1226.79 to mileposts 1227.10 and 1227.58 have not undergone Section 106 review. Accordingly, OEA recommends imposing a condition providing that, with respect to these portions of the Line, BNSF will be prohibited from initiating any salvage activities related to abandonment (including removal of tracks and ties) and required to retain its interest in, and take no steps to alter the historic integrity of, all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process has been completed. BNSF shall report back to OEA regarding any consultations with the SHPO and the public. BNSF will be prohibited from filing its consummation notice for any portion of the Line until the Section 106 process has been completed and the Board has removed this condition.

Additionally, pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database to identify federally-recognized tribes that may have ancestral connections to the area. The database identified two tribes as having a possible interest in the project area. OEA provided a copy of the EA to the tribes for comment. As noted above, no comments were filed.

Interim trail use. As indicated above, the City filed a request for the issuance of a NITU for the Line under the National Trails System Act, 16 U.S.C. § 1247(d), and 49 C.F.R. § 1152.29 to provide time to negotiate with BNSF for acquisition of the right-of-way for use as a recreational trail and for rail banking. The City has submitted a statement of willingness to assume full responsibility for the management of the right-of-way, for any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way, as required by 49 C.F.R. § 1152.29. The City has also acknowledged that the use of the right-of-way for trail purposes is subject to the trail sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on June 1, 2017, BNSF states that it does not object to the issuance of a NITU to the City.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and BNSF does not object, the Board will issue a NITU for the Line. The parties may negotiate an agreement during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) & (h). If no agreement is reached within 180 days, BNSF may fully abandon the Line, subject to the conditions imposed

(. . . continued)
"EL-26147."

below. See 49 C.F.R § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

Public use. In the EA, OEA stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. In its May 23, 2017 filing, the City asks that BNSF be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The City also asks that BNSF be prohibited from removing or destroying potential trail-related structures such as bridges, trestles, and tunnels. The City's justification for its request is that the rail corridor is suitable for other public use, specifically trail use, and that the 180-day period is needed to complete negotiations with BNSF.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring BNSF to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from September 13, 2017, the effective date of the exemption. A public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, BNSF is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

The parties should note that operation of public use or trail use procedures could be delayed, or even foreclosed, by the offer of financial assistance (OFA) process under 49 U.S.C. § 10904. As stated in Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 608 (1986), an OFA to acquire rail lines for continued rail service or to subsidize rail operations takes priority over public use or interim trail use/rail banking. Accordingly, if an OFA is timely filed under 49 C.F.R. § 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 C.F.R. § 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 C.F.R. § 1152.27(f). Finally, if the Line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and public and trail use precluded. Alternatively, if a sale under the OFA procedures does not occur, the public and trail use processes may proceed.

This action will not significantly impact the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by BNSF of the above-described Line, subject to the employee protective conditions set forth in Oregon Short Line and the condition that, with respect to the portion of the Line from milepost 1226.79 to mileposts 1227.10 and 1227.58, BNSF shall not initiate any salvage activities related to abandonment (including removal of tracks and ties) and shall retain its interest in and take no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the project right-of-way (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process has been completed. BNSF shall report back to OEA regarding any consultations with the SHPO and the public. BNSF may not file its consummation notice for any portion of the Line until the Section 106 process has been completed and the Board has removed this condition.

2. BNSF may not consummate the abandonment or conduct any salvage activities until MMT has confirmed to BNSF that MMT has received and exercised authority to discontinue service over the Line.

3. BNSF may not consummate the abandonment until Northwest Drywall and CHS have been relocated.

4. BNSF is directed to serve copies of this decision on Northwest Drywall and CHS so that they receive the decision within five days of the service date, and to certify to the Board contemporaneously that it has done so.

5. An OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 24, 2017, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1).⁶ Each OFA must be accompanied by the filing fee of \$1,700.⁷ See 49 C.F.R. § 1002.2(f)(25).

⁶ The Board's regulations regarding OFAs have recently been modified. See Offers of Financial Assistance, EP 729 (STB served June 29, 2017). Among other modifications, any person now seeking to file an OFA must provide evidence of a continued need for rail service on the line subject to the OFA. 49 C.F.R. § 1152.27(c)(1)(iv)(E).

⁷ Effective September 1, 2017, the fee will be \$1,800. See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2017 Update, EP 542

6. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in boldface on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

7. Provided no OFA has been received, this exemption will be effective September 13, 2017.

8. Petitions to stay and petitions to reopen must be filed by August 29, 2017.

9. Pursuant to 49 C.F.R. § 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by BNSF’s filing of a notice of consummation by August 14, 2018, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Board Members Begeman, Elliott, and Miller.

(. . . continued)

(Sub-No. 25), slip op. app. C at 20 (STB served July 28, 2017).